F. M. S. REPORTS

[APPELLATE CIVIL JURISDICTION]

BURTON, J.

November 9, 1934.

TAN KAI KOK.....Appellant.

v.

THOR TEIK SENG .....Respondent.

[SELANGOR COLLECTOR'S CIVIL APPEAL No. 35 of 1934]

The Land Code, 1926, Sections 138 and 141 —Notice to chargor—Waiver of irregularity.

The appellant charged certain lands in favour of the respondent to secure the repayment of the sum of $4,500 with interest.

Under section 138 of the Land Code, 1926, the respondent served upon the appellant, on the 15th November, 1933, a notice alleging default in payment of interest. This notice did not conform with the requirements of sub-section (i) (a) of Section 138 in that it did not specify the time within which the default was to be repaired, but no objection was taken to this defect at the hearing before the Collector.

Held, that the failure to specify the time in the notice is not an irregularity that goes to the root of the chargee's rights, and that the words in section 141 (i) "After such default continuing for a space of thirty days from the date when such notice was given or posted on the land, or for such longer period as may in the notice be for that purpose limited" mean that unless the chargor has specified a longer period in the notice a default of thirty days from the date of service gives the chargee the right to apply under section 141.

Decision in *Chong Hin* v. *Yap Sin Yee*, (1933-1934) F.M.S.L.R. 150; 3 Mal.L.J. 68 followed.

M. Morrison for the appellant.

A. J. Bostock Hill for the respondent.

Cur. Ad. Vult.

BURTON, J.—This appeal concerns a charge dated 8th June, 1932, and made by Tan Kai Kok of Telok Anson in favour of Thor Teik Seng to secure a sum of $4,500 and interest. The money was secured on E.M.R. 5324, 5325, 5326 and 5327 in the mukim of Sabak Bernam. The principal was repayable on 8th June, 1934 and the interest was payable monthly by sums of $54.00. On the 23rd August, 1934, the Collector of Land Revenue, Sabak Bernam, made an order for sale of the land. He also recorded that he found the charge valid, and that default had been made.

This order was attacked on many grounds; some are mere technicalities, and some affect the merits. I do not propose to deal with the purely technical objections. They misled no one and would not avail to set aside an order otherwise good.

The proceedings for sale of this land were opened when Thor Teik Seng sent a notice under section 138 of the Land Code, 1926, dated 2nd November, which was served on the chargor by A. R. post on 15th November, 1933.

The default alleged by this notice is failure "to pay the monthly interest of the sum of $54 per mensem," and alleges that the default has continued for a space of two months. It requires the chargor to repair such default "by settlement of the arrears of interest which became due together with the principal which became due."

This notice does not conform to the requirements of section 138 (i) (a) for it does not specify the time within which the default is to be repaired.

It was followed by an application under section 141. This is dated 12th June, 1934 and states the chargor's default to be failure "to pay regularly the monthly interest and the principal due under the above charge for a space of one month" and that the default has continued for seven months. It also states that the chargee has given the chargor one month's notice to repair the defect.

The application came on for hearing before the Collector on 16th and 23rd August, 1934. At the hearing neither party was represented, but no objection was taken to any defects in the proceedings; the evidence was chiefly directed to showing that the transaction was not really what it purported to be and that there was on the merits good cause for not making the order of sale. The Collector rejected this contention, but I do not think I need consider this part of the case at all or decide whether he was right or wrong in rejecting the chargor's contention or as was suggested even in adjudicating on it. I desire to say nothing which may in any way prejudice future proceedings.

I do not think the Collector's order can stand for other reasons. In the first place Mr. Morrison argued that it must fall with the notice under section 138, and that that notice was irremediably bad because of its failure to specify a time within which the breach must be repaired. Mr. Bostock Hill pressed upon me two cases, *Lau Yau Weng* v. *the Bank of Malaya*, (1933-1934) F.M.S. L.R. 28; 2 Mal. L.J. 250 and *Chong Hin* v. *Yap Sin Yee*, (1933-1934) F.M.S. L.R. 150; 3 Mal. L.J. 68.

In the first case the Court of Appeal held unanimously that the chargors by not objecting to the form of the notice under section 138 had waived the irregularity. The irregularity was that the notice under section 138 was given to Lin Pui Yew, the original chargor, and contained no reference to the present appellants who were Lin Pui Yew's transferees.

This irregularity I think may be regarded as merely one of form for the notice under section 138 though directed to Lin Pui Yew was correctly served on the appellants, and no one was misled or deceived by the error. The irregularity in the present case, however, is of a different nature. But it is precisely the same as the irregularity in *Chong Hin* v. *Yap Sin Yee* (*supra*) where Terrell, Ag. C.J. followed and extended the principle of *Lau Yau Weng* v. *The Bank of Malaya*, (*supra*) and held that although the notice did not specify the time for payment, the irregularity had been waived because the chargor had not made his objection before the Collector. An appeal was lodged against this decision but the parties came to a settlement and it was not proceeded with. Similarly the irregularity in *Davis* v. *Galmoye*, 39 Ch. D. 322, was of procedure not affecting the merits.

Mr. Morrison now invites me not to follow the decision of Terrell, Ag: C.J. I have no doubt that the whole object of the notice under section 138 is to tie down the defaulter to a definite date for payment. It is analogous to a Four-day order, the purpose being to limit the defaulter to a final date after which the law may be set in motion and proceedings taken against the land. It is argued that the failure to pay within the time specified is a condition precedent of proceedings against the land; and consequently this is not an irregularity of the kind contemplated in *Lau Yau Weng* v. *The Bank of Malaya*, (*supra*) but a disobedience to a provision of law which goes to the root of the chargee's rights; and if there were nothing else in it, I think I should be prepared to agree with Mr. Morrison's argument. But I find in section 141 (i) the words :—

> "After such default continuing for the space of thirty days from the date when such notice was given or posted on the land, or for such longer period as may in the notice be for that purpose limited....."

These words mean beyond doubt that unless the chargee has specified a longer time in the notice a default of thirty days from the date of service gives the chargee the right to apply under section 141. The words of section 149 are similar. It follows that the failure to specify the time in the notice is not an irregularity that goes to the root of the chargee's rights, and I see no reason to differ from the decision in *Chong Hin* v. *Yap Sin Yee*, (*supra*).

But the case does not end here. The Collector has found that there was default, and Mr. Morrison has argued that he had no proper grounds for this finding. The notice under section 138 alleges that a default occurred, and presumably in August, 1933. But I cannot anyhow reconcile the times given in the notice with the seven months mentioned in the application. But the notice also claims payment of the principal which was not due by the terms of the charge until 8th June, 1934. But I assume that the chargee thought that the principal became due on default of payment of any instalment of interest under a clause in the document of charge :—

> "Thirdly if I make default in any one payment of the monthly interest the whole amount then remaining unpaid shall immediately become due and payable on demand."

The grammatical meaning of this clause is baffling, but I will assume that it means what the chargee says it means. There is, therefore, a clear though somewhat indefinite allegation in the notice and application that the chargor was in arrear with his payments of interest for several months, and that consequently the principal had fallen due, although there is no evidence of a formal demand except the notice under section 138, though this is probably sufficient. But in the hearing before the Collector on 16th August, 1934 the chargee said :—

> "The chargor has not paid any cent towards the principal, and he owes only interest in respect of the period 8th July to 8th August," and the chargor said:—
> "After the execution (of the charge) I collected the house rent and paid the chargee $54 monthly."

It is impossible to reconcile these statements with the previous allegations, though the chargee's may be reconciled by assuming a late payment of accrued interest. But such a payment would waive the breach, and waive the breach not only in respect of the interest, but also on account of the principal which had fallen due solely because of the failure to pay interest. I can find, therefore, on the facts no justification whatever for the Collector's finding that there was default. It is true that the principal sum of $4,500 fell due on 8th June, 1934 before the hearing of this case, but that default was not part of these proceedings and could not be taken into account because no notice under section 138 or possibly 139 had been issued in respect of that default.

I conclude, therefore, that the order of the Collector made on 23rd August, 1934 must be set aside and all the proceedings on which it is based.

Collector's order set aside.